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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AMANDA HILL and GAYLE HYDE, individually and on On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

QUICKEN LOANS INC.,

Defendant.

Case No. 5:19-cv-00163-FMO-SP

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF QUICKEN LOANS INC.'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: March 12, 2020
Time: 10:00 a.m.
Ctrm.: 6-D
Judge: Hon. Fernando M. Olguin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

By way of its Order denying Quicken Loans Inc.'s Motion to Dismiss Plaintiffs' first amended complaint without prejudice (Dkt. No. 54) ("Order"), this Court gave Plaintiffs the opportunity to conduct jurisdictional discovery (as to Plaintiff Hyde) and then file a second amended complaint pleading factual allegations sufficient to establish this Court's specific personal jurisdiction over Quicken Loans Inc. with respect to Hyde's claim. But the second amended complaint ("SAC") Plaintiffs have now filed contains no such allegations. Beyond this, the same pleadings defects in Plaintiff Hyde and Hill's claims identified by Quicken Loans over nine months ago continue to infect the SAC. Therefore, this Court should not hesitate to grant this Motion and dismiss this lawsuit.

First, with respect to the jurisdictional issue relating to Hyde, this Court permitted her three months of jurisdictional discovery based upon her counsel's representations that, with the benefit of such discovery, Plaintiffs could plead factual allegations connecting Hyde's TCPA cellphone claim to California sufficient to establish this Court's specific personal jurisdiction over Quicken Loans. Order at 2. Indeed, the Order specifically noted that the Court expected the SAC to address the relationship between Hyde's claim and California. *Id.* at 2. But the SAC does no such thing and, in fact, abandons any attempt to plead factual allegations in support of specific personal jurisdiction. Instead, recognizing that there is no California-connection or other basis for general or specific jurisdiction here (as Quicken Loans demonstrated in its Motion to Dismiss the FAC (Dkt. No. 30, and Hyde illustrated by originally bringing her claim against Quicken Loans in the District of Minnesota), the SAC (¶ 4) now pleads (for the first time) that "pendent personal jurisdiction" somehow exists over Hyde's claim. She asserts it exists merely because there is specific jurisdiction in this Court over Hill's

separate claim based on distinct facts unique to Hill. But this new jurisdictional theory gets Hyde nowhere for at least four independent and adequate reasons:

1. Plaintiffs did not allege pendent personal jurisdiction in the FAC and sought leave to amend the complaint regarding only *specific* personal jurisdiction—they did not seek leave to amend their complaint regarding pendent jurisdiction and this Court's Order did not allow such amendment. Order at 2-3;

2. The doctrine of pendent personal jurisdiction does not apply here as a matter of law. The Ninth Circuit has applied pendent personal jurisdiction only when a *single* plaintiff has multiple claims, at least one of which is subject to the court's jurisdiction, and pendent jurisdiction attaches to that same plaintiff's other claims. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991) ("Pendent jurisdiction exists where there is a sufficiently substantial federal claim to confer federal jurisdiction, and a common nucleus of operative fact between the state and federal claims."); *Prime Healthcare Centinela, LLC v. Kimberly–Clark Corp.*, No. CV 14–8390–DMG (PLAx), 2016 WL 7177532, at *2 (C.D. Cal. May 26, 2016) (Gee, J.) (pendent personal jurisdiction does not apply when a non-resident plaintiff "seek[s] to piggyback personal jurisdiction" onto a resident plaintiff's claims);

3. Even assuming the doctrine might somehow apply to permit an out-of-state plaintiff (Plaintiff Hyde) to bring a claim with no connection to California against an out-of-state defendant (Quicken Loans) in this Court (and it should not), the doctrine requires that the pendent claim (Plaintiff Hyde's) arise from the same common nucleus of operative facts as the claim over which this Court has specific jurisdiction (Plaintiff Hill's), and such factual commonality is lacking here. *Kimberly–Clark Corp.*, 2016 WL 7177532, at *2; *Abrahamson v. Berkley*, No. 1:16-CV-0348 AWI BAM, 2016 WL 8673060, at *11 (E.D. Cal. Sept. 2, 2016) (declining to exercise pendent jurisdiction over causes of action lacking common nucleus of operative facts). Indeed, the record evidence confirms that there is no such common nucleus because Hill and Hyde's respective claims arise from

different facts, circumstances, and interactions with third-parties and Quicken Loans. That record demonstrates that (a) Hyde and Hill gave Quicken Loans prior consent to receive text messages at different third-party websites, (b) consented on different dates, (c) agreed to different terms of use, (d) received different text messages on different dates, and (e) had different interactions with Quicken Loans before and after the text messages. Tayman Decl. Ex. C at 3-4; SAC ¶¶ 15-16, 23, 29; Dkt. No. 29-1 at 1, 3-6.; and

4. Allowing Plaintiff Hyde's claim to proceed on pendent personal jurisdiction would enable Plaintiffs' improper forum-shopping.

Second, with respect to the pleadings defects applicable to Hyde and Hill's claims, the SAC still fails to plead the requisite, plausible factual allegations that Quicken Loans made the challenged texts with an automatic telephone dialing system ("ATDS"). Instead, and notwithstanding that Quicken Loans has repeatedly identified this fatal pleadings defect in its motions to dismiss in this matter (*See* Dkt. Nos. 14 and 30), in Hyde's original Minnesota action (*Hyde v. Quicken Loans Inc*., No. 0:19-cv-00196-JNE-ECW (D. Minn. Apr. 1, 2019), Dkt. No. 14), and Plaintiffs are now on their third complaint in this Court, Plaintiffs continue to resort to parroting the statutory ATDS definition and caselaw concerning the ATDS element. SAC ¶¶ 33-34. As the Supreme Court has made clear, these types of conclusory allegations are insufficient to sustain Plaintiffs' burden to plead plausible, factual allegations in support of their cellphone provision claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

PROCEDURAL HISTORY AND BACKGROUND

Hill filed her original complaint in this action on January 28, 2019. Dkt. No. 1. In response, Quicken Loans timely filed a Motion to Dismiss demonstrating that Hill had failed to state a cognizable TCPA claim on account, among other things, of her failure to plead the ATDS element of her cellphone provision claim. Dkt. No. 14. On April 1, 2019, after Hyde (a Minnesota resident) voluntarily

dismissed her TCPA case against Quicken Loans in the District of Minnesota in response to Quicken Loans' Motion to Dismiss challenging, among other things, her defective ATDS allegations, Hill and Hyde filed the First Amended Complaint here. Dkt. No. 20 ("FAC"). The FAC contained no new factual allegations with respect to the ATDS element of Plaintiffs' cellphone provision claims. *Id.*

In response to the FAC, Quicken Loans timely moved to dismiss again, demonstrating that (a) Plaintiffs' conclusory ATDS allegations remained defective, and (b) the FAC was devoid of allegations sufficient to establish this Court's jurisdiction (general or specific) over Quicken Loans with respect to Hyde's individual TCPA cellphone provision claim. Dkt. No. 30. In her opposition, Hyde requested leave to amend to add the allegations of specific personal jurisdiction identified in her proposed second amended complaint filed with the Court (Dkt. No. 36-10),[1] or in the alternative for jurisdictional discovery to identify facts to plead specific personal jurisdiction. Dkt. No. 36 at 1. In support of the request for leave to amend and for jurisdictional discovery, Plaintiffs represented to this Court that Hyde could "plausibly allege fact[s] supporting specific jurisdiction over Quicken Loans" (Dkt. No. 36 at 3) because it was "plausible" that Quicken Loans obtained Hyde's phone number from a California company (*id.* at 4-7) and that the short code used to send the text messages to Hyde may have been connected to California. *Id.* at 11.

On October 17, 2019, this Court granted Plaintiffs leave to amend to plead specific personal jurisdiction, granted Plaintiffs' request to conduct jurisdictional discovery, and ordered Plaintiffs to file a SAC by January 17, 2020. Order at 2-3, 4. As this Court's Order granted leave to file an amended complaint, it did not

[1] During jurisdictional discovery, Quicken Loans asked Plaintiffs to provide the factual basis (if any) for the assertions of a California connection to Hyde's claims in the proposed amended complaint filed with this Court. Hyde objected to this basic discovery and declined to produce a single document supporting the allegations in her proposed second amended complaint that Quicken Loans obtained her phone number from a California company. Tayman Decl. Ex. B at 8.

reach Quicken Loans' other arguments for dismissal and denied its motion to dismiss the FAC without prejudice. As to the jurisdictional issue, this Court found Hyde had a colorable basis for requesting personal jurisdiction discovery based on her counsel's representations that: (a) Quicken Loans obtained Hyde's phone number from a California company (LowerMyBills.com ("LMB")); and (b) the SMS code used to send text messages Hyde received was tied to a California address. *Id.* at 2. And, consistent with this, the Order stated that the Court "expects that Hyde will plead the existence of their relationship [between Hyde and LMB] (to the extent one existed) in the second amended complaint." *Id.*

Plaintiffs filed the SAC on January 17, 2020. Dkt. No. 73. Notwithstanding her counsel's representations to this Court about a California connection to her claim and three months of jurisdictional discovery to find one, the SAC contains no such allegations. *See generally* SAC. This is because, as Quicken Loans demonstrated in its Motion to Dismiss the FAC (Dkt. Nos. 30 and 43) and jurisdictional discovery confirmed, Plaintiff received the challenged text messages in Minnesota, Quicken Loans received her number from a North Carolina Company (Lending Tree),[2] the SMS short code has been registered to Quicken Loans Inc. since at least 2013 at its business address at 1050 Woodward Avenue, Detroit, MI 48226, and all text messages sent to Hyde from that code originated from Detroit, Michigan. *See* Tayman Decl. Ex. A at 11-12, Ex. C at 3-5, 7, and Ex. D at 4. It is thus not surprising that the SAC (a) entirely abandons Hyde's jurisdictional allegations from her *proposed* second amended complaint (Dkt. No. 36-10), and (b) fails to mention either of the two assertions Plaintiffs' counsel represented to this Court provided a colorable basis to permit personal jurisdiction discovery.

Instead, in a last-ditch attempt to save Hyde's claims from dismissal, Plaintiffs now proffer only the conclusory allegation that "[t]he doctrine of pendent

[2] In fact, on May 30, 2019—over four months before this Court's Order—Hyde was informed through third party discovery that LMB had no record of her or her phone number. Tayman Decl. Ex. A at 11 and Ex. E.

personal jurisdiction applies to Ms. Hyde's claims against Defendant." SAC ¶ 4. The SAC, however, offers no factual or other basis to support this new jurisdictional theory that Plaintiffs never identified or secured leave of this Court to plead. In addition, the SAC contains the same pleading defects as to the ATDS element of Plaintiffs' claims as were contained the original complaint here.

ARGUMENT

I. THE MOTION TO DISMISS STANDARD

Federal courts must dismiss claims under Fed. R. Civ. P. 12(b)(2) when they lack personal jurisdiction over the defendant. "[T]he plaintiff bears the burden of demonstrating that jurisdiction is appropriate." *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) (citations omitted). Federal courts have personal jurisdiction over a foreign defendant only when (1) there is general jurisdiction because the defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State" (*Daimler AG v. Bauman*, 571 U.S. 117, 138-39 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)); or (2) there is specific jurisdiction because the alleged injuries arise out of the defendant's forum-related activities. *Goodyear*, 564 U.S. at 919 (citation omitted) ("Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy,' . . . or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."). The Supreme Court has held under similar circumstances that courts do not have specific jurisdiction to entertain nonresidents' (like Hyde) claims when they do not claim to have suffered harm in the forum state: "The relevant plaintiffs are not California residents and do not claim to have suffered harm in that State. In addition, [] all the conduct giving rise to the nonresidents' claims occurred elsewhere. It follows that the California courts cannot claim specific jurisdiction." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1782 (2017).

To survive a Rule 12(b)(6) motion to dismiss, a complaint must meet Rule 8(a)'s pleading requirements and allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). Rather, the allegations "must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)).

Application of these well-established standards here requires dismissal of the SAC in its entirety.

II. THE SAC FAILS TO PLEAD THAT THIS COURT HAS PERSONAL JURISDICTION OVER QUICKEN LOANS AS TO HYDE'S CLAIM.

This Court must dismiss Hyde from this lawsuit because she has failed to carry her burden to plead facts sufficient to make out a prima facie case that this Court has personal jurisdiction (general or specific) over Quicken Loans as to her claim. In fact, in the SAC, Plaintiffs do not plead that general or specific jurisdiction exists in this Court as to Hyde's claim. This is because they cannot. The jurisdictional discovery Plaintiffs requested, and this Court permitted, has confirmed there are no grounds for personal jurisdiction because Quicken Loans is not at home in California and Hyde's claim has no nexus to California. *Daimler AG*, 571 U.S. at 137-38; *Estakhrian v. Obenstine*, No. CV 11-3480 FMO (CWx), 2015 WL 12698304, at *6 (C.D. Cal. July 9, 2015) (Olguin, J.), *appeal filed*, No. 19-55494 (9th Cir. May 2, 2019) (dismissing for lack of personal jurisdiction; "[J]urisdictional discovery is complete, and [Plaintiff] has yet to proffer any

evidence indicating that personal jurisdiction is warranted."); *Picot*, 780 F.3d at 1212 (affirming no specific personal jurisdiction over defendant when bulk of challenged conduct occurred outside of forum state). Recognizing this, Plaintiffs claim that pendent personal jurisdiction exists here in a last-ditch attempt to save Hyde's claim, which she had originally (and properly) filed in the District of Minnesota, from dismissal. This effort fails for four reasons.

First, Plaintiffs did not seek and obtain leave to amend their prior complaint to allege pendent personal jurisdiction (Dkt. No. 36), and this Court's Order did not permit such amendment. Dkt. No. 54. Plaintiffs did not plead pendent personal jurisdiction in the original or first amended complaints (Dkt. Nos. 1, 20), nor did Plaintiffs raise this theory in opposition to Quicken Loans' Motion to Dismiss the FAC on jurisdictional grounds. Dkt. No. 36. Instead, as the record confirms, Plaintiffs secured leave to conduct jurisdictional discovery and file the SAC based upon representations (and a proposed amended complaint) that they could plead facts sufficient to support *specific* personal jurisdiction as to Hyde's claim—there was no mention of pendent personal jurisdiction. Dkt. No. 36; *see also* Order at 2. Now, having secured that outcome in their favor and having put Quicken Loans to the burden and expense of jurisdictional discovery confirming the precise jurisdictional points Quicken Loans made in its Motion to Dismiss briefing (Dkt. Nos. 30, 43), Plaintiffs have now changed course 180-degrees, abandoning their prior specific jurisdictional arguments and representations in favor of a theory that could have been raised *nine months ago* but was not. This Court should not hesitate to reject Plaintiffs' attempt to change course now that their effort proved unsuccessful, particularly where this Court permitted leave to amend to plead specific personal jurisdiction and Plaintiffs have failed to do so.

Second, even if this Court is inclined to consider this new theory (and it should not be), the Court should reject it as contrary to law. Hyde predicates her theory exclusively upon this Court's specific jurisdiction over Quicken Loans with

respect to Hill's separate and distinct individual claim—not anything connecting Hyde to this State. However, consistent with controlling Ninth Circuit decisions, the doctrine of pendent jurisdiction applies only when a *single* plaintiff has multiple claims, at least one of which is subject to the court's jurisdiction, and pendent jurisdiction attaches to that *same plaintiff's* other claims. *Gilder*, 936 F.2d at 421 ("Pendent jurisdiction exists where there is a sufficiently substantial federal claim to confer federal jurisdiction, and a common nucleus of operative fact between the state and federal claims."); *Pilgrim v. Gen. Motors Co.*, 408 F. Supp. 3d 1160, 1168 (C.D. Cal. 2019) (same). "This doctrine does not apply, however, to situations like the one here where Plaintiffs seek to piggyback personal jurisdiction over one set of Plaintiffs' claims (the non–California plaintiffs) onto claims by a different set of plaintiffs (the California plaintiffs) notwithstanding that the former do not arise from or relate to Defendants' contacts in the forum state." *Kimberly–Clark Corp.*, 2016 WL 7177532, at *2; *see also Level 3 Commc'ns, LLC v. Ill. Bell Tel. Co.*, No. 4:13-CV-1080 (CEJ), 2014 WL 50856, at *2 (E.D. Mo. Jan. 7, 2014), *vacated in part on other grounds*, No. 2014 WL 1347531 (E.D. Mo. Apr. 4, 2014) ("Pendent personal jurisdiction does not stand for the proposition that a second plaintiff can essentially 'piggyback' onto the first plaintiff's properly established personal jurisdiction."); *Bristol-Myers Squibb*, 137 S. Ct. at 1782 (rejecting theory that jurisdiction existed over out-of-state plaintiffs in state law class action by way of jurisdiction over resident plaintiffs). This distinction, of course, makes sense. In the case of a single plaintiff with federal and state law claims arising from the same common nucleus of operative facts, there is at least proper jurisdiction in the federal court with respect to the plaintiff's federal claim. The question then is whether to extend that jurisdiction to the state law claim if it arises from the same common nucleus of operative fact. That is not the case where, as here, the plaintiff (Hyde) seeks to predicate jurisdiction over the defendant based upon the Court's

jurisdiction over a different plaintiff's (Hill's) separate claim and that other plaintiff (Hyde) could not independently sue the defendant in that same Court.

Third, even if pendent jurisdiction could allow a non-resident plaintiff with no connection between her claim and the forum state to latch onto a resident-plaintiff's case (and it does not), the doctrine requires that a common nucleus of operative facts exist between the claim as to which there is jurisdiction and the claims for which there is no jurisdiction. Here, however, the record evidence confirms that there is (and can be) no such common nucleus. Hill and Hyde have separate and distinct TCPA cellphone provision claims that arise from different facts and different circumstances. This is best illustrated by comparing Hill and Hyde's claims across the SAC, the Hyde jurisdictional discovery record and the Hill motion to compel arbitration record. That comparison reveals that: (1) Hill submitted her phone number and consent to be contacted to lmb.YourVASurvey.info ("YourVASurvey") and LMB in October and November 2018 (*see* Dkt. No. 29-1 at 1, 3-6), whereas Hyde submitted her phone number and consent to be contacted to a different website (Lending Tree) in September 2018 (Tayman Decl. Ex. C at 3-4); (2) in submitting her request, Hill agreed to arbitrate her claims, whereas Hyde agreed to a different company's terms and conditions and is not presently subject to a motion to compel arbitration; (3) Hill and Hyde received different text messages weeks and months apart from each other (*see* SAC ¶¶ 15-16, 23, 29); (4) Hill challenges text messages she received in California whereas Hyde challenges text messages she received in Minnesota; and (5) both Hill and Hyde had separate, unique interactions with Quicken Loans before and after the text messages that are relevant to resolving their claims. *See supra* p. 5.

As a result of these (and other differences), any trial of the facts and evidence necessary to resolve Hill's claim will differ from that necessary to resolve Hyde's. For example, the evidence about Hill's interactions with YourVASurvey, LMB, and Quicken Loans in October and November 2018, including the evidence needed

to resolve the existing disputes about whether Hill clicked the submission button during her visits to YourVASurvey and LMB and agreed to arbitrate her claim against Quicken Loans and consented to the challenged texts when she did so, will shed no light on whether Hyde did any of the same (or different) things during her interactions with Lending Tree at different times. As such, the witnesses, text records, website records, data records, and video playback evidence concerning the Plaintiffs' different interactions with different entities and different websites at different times resulting in different challenged text messages will, of course, be different for Hill and Hyde. As a result, the requisite common nucleus of operative facts is lacking here. Under circumstances where "pendent claims" arise from different transactions, different occurrences, and require different evidence to resolve, courts routinely hold that exercising pendent jurisdiction is improper. *Kimberly–Clark Corp.*, 2016 WL 7177532, at *2 (declining to exercise pendent personal jurisdiction over non-resident plaintiff's claims); *Monterey Bay Military Housing, LLC v. Ambac Assurance Corp.*, No. 17-cv-04992-BLF, 2019 WL 4888693, at *23 (N.D. Cal. Oct. 3, 2019) (dismissing on personal jurisdiction grounds; "the Court would have grave reservations about applying the doctrine [of pendent personal jurisdiction] on the facts of this case, in which each of the Plaintiffs engaged in separate and distinct transactions with Defendants."). This Court should reach the same conclusion here.

Finally, even if Plaintiffs could somehow overcome the insurmountable barriers to pendent jurisdiction here (and they cannot), this Court has discretion to decline to exercise such jurisdiction and should not hesitate to do so. *City of Almaty v. Khrapunov*, No. CV 14-3650 FMO (CWx), 2018 WL 6074544, at *9 (C.D. Cal. Sept. 27, 2018) (Olguin, J.) ("pendent jurisdiction is a doctrine of discretion, not of plaintiff's right") (citation omitted). At bottom, Hyde is attempting to take a dispute between a Minnesota resident and Michigan company, and place it on the other side of the country in California for no legitimate reason—

that is blatant and improper forum shopping. Hyde voluntarily dismissed her Minnesota action (which was filed prior to Hill's original complaint) in order to prevent a stay of Hill's case based on the first-filed doctrine,[3] joined Hill's action without pleading any basis for jurisdiction, misled this Court regarding the basis for personal jurisdiction and the need for jurisdictional discovery, and now asserts a new (and unavailing) theory of pendent jurisdiction without any basis. Indeed, as noted, Hyde went so far as to file with this Court a proposed second amended complaint containing demonstrably false allegations in order to launch a fishing expedition to find a non-existent connection with California. Dkt. No. 36-10. These circumstances strongly favor that this Court decline to exercise pendent jurisdiction. Order at 6, *Pagano v. Quicken Loans Inc.*, No. 3:18-cv-00117-HES-JBT (M.D. Fla. July 19, 2018), Dkt. No. 48 (in suit with one resident named plaintiff and one non-resident named plaintiff, dismissing TCPA claims of non-resident named plaintiff and declining to exercise pendent jurisdiction over such plaintiff's claims bearing no connection to the forum state); *see also Khrapunov*, 2018 WL 6074544, at *9 (declining to exercise pendent jurisdiction over plaintiff's state law claim).[4]

In light of the foregoing, this Court should dismiss Hyde from this lawsuit without any further opportunity to amend. *Johnson v. Comm'n on Presidential Debates*, No. SA CV 12-1600 FMO (ANx), 2014 WL 12597805, at *13 (C.D. Cal.

[3] Quicken Loans' previous Motion to Stay outlines Plaintiffs' patent forum shopping strategy and Plaintiffs' counsels' coordinated efforts to voluntarily dismiss two other lawsuits filed earlier in time than Hill's suit in order to avoid litigating in other circuits. Dkt. No. 15. Plaintiffs' gamesmanship has required Quicken Loans to spend the time, money and effort to file what is now its fourth motion to dismiss (collectively) directed at Plaintiffs.

[4] This conclusion is reinforced by counsel for Plaintiffs' own conduct in filing a duplicative and overlapping class action against Quicken Loans in the District of Arizona earlier this month. Complaint, *Winters v. Quicken Loans Inc.*, No. 2:20-cv-00112-MTL, (D. Ariz. Jan. 15, 2020), Dkt. No. 1. This filing by an out-of-state plaintiff who could not sue in California belies Plaintiffs' apparent claim that pendent jurisdiction is somehow appropriate here.

Jan. 6, 2014) (Olguin, J.) (dismissing without leave to amend when "allowing plaintiffs a third opportunity to allege sufficient facts to establish personal jurisdiction over [defendant] would be futile"; "no amendment will confer personal jurisdiction over [defendant] upon this court where it does not exist"); *Estakhrian*, 2015 WL 12698304, at *6 (dismissing and declining leave to amend as to personal jurisdiction).

III. THE SAC FAILS TO PLEAD THE ATDS ELEMENT OF PLAINTIFFS' CELLPHONE PROVISION CLAIMS.

An essential element of any cellphone provision claim is that the challenged calls or texts were made using an "automatic telephone dialing system." 47 U.S.C. § 227(b)(1)(A). But Plaintiffs offer only bald assertions and a series of legal conclusions to support their claim that Quicken Loans used an ATDS to text them. SAC ¶¶ 33-34. These legal conclusions, which are unchanged from Hill's original complaint and which Hill's counsel has pled in verbatim (or nearly verbatim) form against various defendants in other TCPA cases for years now,[5] do nothing more than parrot the statutory ATDS definition and general ATDS caselaw on what constitutes an ATDS. This is insufficient. Three examples—and there are others—illustrate the point.

First, while Plaintiffs baldly assert that Quicken Loans' unidentified "hardware" and "software" has the "capacity to store, produce, and dial random or sequential numbers," that language just parrots the statutory ATDS definition. SAC ¶ 33; 47 U.S.C. § 227(a)(1). There are no facts (none) to support this unadorned conclusion. "Plaintiffs must do more than simply parrot the statutory

[5] Complaint ¶ 18, *Motley v. Contextlogic, Inc.*, No. 3:18-cv-02117-JD (N.D. Cal. Apr. 6, 2018), Dkt. No. 1 (pleading same conclusory ATDS allegations as alleged in Hill FAC ¶¶ 32-33); Complaint ¶ 18, *Farnham v. Caribou Coffee Co.*, No. 3:16-cv-00295-wmc (W.D. Wis. May 5, 2016), Dkt. No. 1 (same); Complaint ¶ 27, *Soukhaphonh v. Hot Topic, Inc.*, No. 2:16-cv-05124-DMG-AGR (C.D. Cal. July 12, 2016), Dkt. No. 1 (same); Complaint ¶¶ 22-23, *Renvall v. Albertsons Cos. Inc.*, No. 3:18-cv-00809-H-NLS (S.D. Cal. Apr. 27, 2018), Dkt. No. 1 (same).

language. . . . [And, consistent with this,] the vast majority of courts to have considered the issue have found that '[a] bare allegation that defendants used an ATDS is not enough.'" *Baranski v. NCO Fin. Sys., Inc.*, No. 13 CV 6349(ILG)(JMA), 2014 WL 1155304, at *6 (E.D.N.Y. Mar. 21, 2014) (citation omitted) (dismissing TCPA claim for failure to allege ATDS element); *Tuck v. Portfolio Recovery Assocs., L.L.C.*, No. 19-CV-1270-CAB-AHG, 2019 WL 5212392, at *3 (S.D. Cal. Oct. 16, 2019) (dismissing TCPA claim where "complaint simply parrots the statutory definition of an ATDS").

Second, while Paragraph 33 contains a number of assertions about *en masse* texts, the SAC is devoid of a single factual allegation supporting the assertion that a single one of the unidentified text messages to Hill, Hyde or anyone else was sent *en masse*—whatever Plaintiffs may mean by that term. Instead, Hill and Hyde collectively identify only six specific text messages, none of which contained the same content and which were each received weeks or months apart. SAC ¶¶ 15-16, 23, 29.

Finally, while Plaintiffs mimic the language from the Ninth Circuit's decision in *Marks* to allege that Quicken Loans' unidentified "hardware and software" is an ATDS because it purportedly can "receive[] and store[] lists of telephone numbers to be dialed and which then dial[] such numbers automatically" (SAC ¶ 34; *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018)), Plaintiffs add no factual enhancement sufficient to render these bald assertions plausible. Although it is true that "plaintiffs cannot be expected to provide specific details about the type of dialing systems used to deliver the calls they receive, it is entirely reasonable to demand that plaintiffs provide sufficient information about the timing and content of the calls they receive to give rise to the reasonable belief that an ATDS was used." *Aikens v. Synchrony Fin. d/b/a Synchrony Bank*, No. 15-10058, 2015 WL 5818911, at *4 (E.D. Mich. July 31, 2015), *report and recommendation adopted*, No. 15-cv-10058, 2015 WL 5818860

(E.D. Mich. Aug. 31, 2015) ("the Court may not accept an assertion that an ATDS was used simply because Plaintiff states as much"). Yet, Hill and Hyde do not plead any factual allegations sufficient to give rise to any such inference. *Bodie v. Lyft*, No. 3:16-cv-02558-L-NLS, 2019 WL 258050, at *2 (S.D. Cal. Jan. 16, 2019) (dismissing TCPA claim because complaint "merely parrots statutory definition of an ATDS"); *Chyba v. Wash. Mutual*, No. 12cv838 JAH (BLM), 2014 WL 12628468, at *5 (S.D. Cal. Jan. 21, 2014) (merely parroting caselaw is insufficient to support a claim for relief), *aff'd*, 671 F. App'x 426 (9th Cir. 2016).

Put simply, Plaintiffs' bald regurgitation of the statutory language and caselaw—repeated by their counsel from TCPA case to TCPA case—is insufficient to move their cellphone provision claim across the line from possible to plausible. Indeed, the Supreme Court has held that conclusory allegations like Plaintiffs' here are insufficient to state a claim because those allegations are devoid of the requisite factual enhancement. *Twombly*, 550 U.S. at 557; *Iqbal*, 556 U.S. at 678. To conclude otherwise would "eviscerate the plausibility standard to which complaint's allegations must adhere under Rule 8." *Priester v. eDegreeAdvisor, LLC*, No. 5:15-cv-04218-EJD, 2017 WL 4237008, at *2 (N.D. Cal. Sept. 25, 2017). Faced with similarly defective allegations, federal courts routinely dismiss conclusory cellphone provision claims like Plaintiffs' here. *See, e.g.*, *Bodie*, 2019 WL 258050, at *2; *Armstrong v. Inv'r's Bus. Daily, Inc.*, No. CV 18-2134-MWF (JPRx), 2018 WL 6787049, at *6 (C.D. Cal. Dec. 21, 2018) (Fitzgerald, J.) (dismissing TCPA claim when allegations were "mere recitation of the legal definition of an ATDS"); *Musenge v. SmartWay of the Carolinas, LLC*, No. 3:15-cv-153-RJC-DCK, 2018 WL 4440718, at *3 (W.D.N.C. Sept. 17, 2018) (dismissing TCPA claim where Plaintiff did not allege the use of an ATDS but instead simply attached copies of the text messages she received); *Gill v. Navient Sols., LLC*, No. 8:18-cv-1388-T-26SPF, 2018 WL 7412717, *1 (M.D. Fla. Aug. 7, 2018) (dismissing TCPA claim that "fail[ed] to describe the phone messages or the

circumstances surrounding the calls, such as the actual messages or conversations, to cause her to believe an ATDS was being used"); *Rhinehart v. Diversified Cent., Inc*., No. 4:17-CV-624-VEH, 2018 WL 372312, at *8-9 (N.D. Ala. Jan. 11, 2018) (dismissing TCPA claim where Plaintiff made only bare allegations that an ATDS was used); *Trenk v. Bank of Am*., No. 17-3472, 2017 WL 4170351 (D.N.J. Sept. 20, 2017) (same). This Court should follow the well-reasoned conclusions from these other courts and dismiss Plaintiffs' defectively-pled cellphone provision claim, particularly given Plaintiffs' choice not to attempt to cure these defects in response to Quicken Loans' previously-filed motions to dismiss. That choice reveals that Plaintiffs have no additional factual allegations to plead to attempt to cure the existing (and continuing) defects.

CONCLUSION

For the forgoing reasons, Quicken Loans respectfully requests that this Court grant the Motion and dismiss the SAC, with prejudice, and award Quicken Loans any additional relief the Court deems warranted and proper under the circumstances.

Respectfully submitted,

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